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No. 84-1044

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF NEW YORK CITIZENS' UTILITY BOARD, INC. AND UTILITY CONSUMERS ACTION NETWORK AS *AMICI CURIAE* URGING AFFIRMANCE

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July 1985

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INTERESTS OF AMICI*

New York Citizens' Utility Board, Inc. ("New York CUB") is a nonprofit membership corporation organized in 1984 under the laws of the State of New York. It was formed in connection with a proceeding before the New York Public Service Commission ("PSC") concerning the representation of the interests of residential utility consumers before the PSC. New York CUB sought permission to enclose its notices in the billing envelopes of certain utility companies in New York, and the PSC tentatively granted that request upon determining that the group's structure, purpose, and proposed

* All parties have consented to the filing of this brief.

activities conform to the guidelines established in its *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes,* Case 28655 (May 14, 1984). *See* J.S. App. A-111 to A-141. The inserts, which would be paid for by New York CUB, would invite utility customers to become members of New York CUB and to participate in its activities. The PSC decided that permitting access by New York CUB would foster representation of the interests of residential ratepayers in PSC proceedings. However, implementation of that decision has been held in abeyance as a result of litigation brought by seven affected utilities, which has resulted in a trial court determination that the *Statement of Policy* is unconstitutional. *Consolidated Edison Co. v. Public Service Commission,* 488 N.Y.S.2d 352 (Sup. Ct. Albany Cty. 1985), *appeal pending* (3d Dept. No. 50109). Because the issue upon which the New York court has ruled is virtually identical to that raised by appellant Pacific Gas and Electric Company ("PG&E"), the outcome of this case is likely to have a direct and substantial impact on New York CUB.

Utility Consumers Action Network ("UCAN") is a nonprofit corporation created in 1983 under the laws of California to represent the interests of residential and small business ratepayers of San Diego Gas and Electric Company ("SDG&E") in regulatory and legislative proceedings. UCAN was granted access to the billing envelopes of SDG&E in California Public Utility Commission ("PUC") Decision No. 83-04-020, which was issued on April 6, 1983, and which became effective 30 days later. J.S. App. A-90 to A-110. Under that decision, UCAN was permitted to enclose its notices in the billing envelopes four times per year, at no cost to SDG&E, during a two-year experimental period. Through such mailings, UCAN attracted approximately 70,000 members. Even though the minimum dues for UCAN are only $4.00 per year, inclusion of the bill inserts has permitted UCAN to raise enough money to participate in six major PUC proceedings involving SDG&E. Shortly before the original two years of access expired on May 6, 1985, UCAN sought extension

or renewal of the program for an additional five years. The PUC recently ruled that it will grant UCAN temporary access to the billing envelopes pending a decision on the request, but it stayed the effectiveness of its order until this case is decided. Decision No. 85-07-014 (July 10, 1985). Thus, the outcome of this case will directly affect UCAN's ability to obtain authorization to continue inserting enclosures in SDG&E's billing envelopes as it has done for the past two years.

SUMMARY OF ARGUMENT

Appellant PG&E and the 16 *amici* supporting its position advance an array of arguments for the unconstitutionality of the decision allowing appellee Toward Utility Rate Normalization ("TURN") to include a flyer four times a year in PG&E's billing envelopes. However, the core of their case boils down to the fact that the access order would require PG&E to carry the messages of a third party (that is, TURN) with which it may disagree. *See* PG&E Brief at 10-27. PG&E argues that the mailings mandated by the PUC infringe upon the utility's constitutional rights, and that therefore the Commission must show that the infringement is justified by a compelling state interest, which it contends has not been done. *See* PG&E Brief at 27-40.

This brief will not attempt to canvass all of the issues in this case, nor to answer each of the arguments made by appellant and those supporting it. Rather, New York CUB and UCAN wish to focus on the infirmity of the unarticulated premise that underlies PG&E's entire case—the assumption that regulated utility corporations enjoy a "right not to speak" which is in all respects the equivalent of an individual's right *to* speak.

PG&E's argument is flawed in three principal respects. First, the "right not to speak" relied upon in *Wooley v. Maynard,* 430 U.S. 705 (1977), and similar cases has its origins in the concept of "freedom of thought," which has a very narrow ambit when applied to business corporations, which can speak but cannot "think". Second, this Court has recognized that the right not to speak, even as invoked by natural persons, is much narrower than

the right to speak, particularly when a regulatory body seeks to require additional statements or disclosures by one who has chosen to speak on a particular subject. PG&E seems to assume that these two very different rights are coextensive and that, as a result, there is a right not to speak under all circumstances in which a governmental prohibition on speech would be improper. Third, PG&E has discussed a number of hypothetical and speculative circumstances under which it claims that its First Amendment rights would be violated by the PUC order under challenge. However, those conjectures provide no basis for striking down this program, particularly since the actual experience in California and elsewhere has shown that the parade of horribles offered up by PG&E is unlikely to come to pass, and that any difficulties that did arise could be dealt with by means far less drastic than eliminating the entire program.

ARGUMENT

A REGULATORY PROGRAM WHICH PERMITS LIMITED ACCESS BY A CONSUMER GROUP TO BILLING ENVELOPES DOES NOT VIOLATE A UTILITY'S FIRST AMENDMENT RIGHTS.

A. *Regulated Utilities Have No "Right Not To Speak" Which Is Comparable To That Of Natural Persons.*

Appellant's first error is its failure to analyze the rationale which underlies the "right not to speak" on which it bases its argument. Thus, in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978), this Court held that corporations enjoy the right of free speech. But it also recognized that certain purely personal constitutional rights are available only to natural persons. "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* at 779 n.14. Under this standard, as we now demonstrate, the right relied on by PG&E, which protects individuals from compelled affirmations, is not available to PG&E, since to apply it in the present context would ignore the nature, history, and purpose of the protection being invoked.

In seeking to establish an invasion of its First Amendment rights, PG&E places its principal reliance on *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980), which held that a utility could not be prohibited from sending inserts about controversial topics to its ratepayers in their billing envelopes, and on *Wooley v. Maynard,* 430 U.S. 705 (1977), *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), and *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), each of which recognized the existence of a right not to communicate or not to associate under certain circumstances.

But in making its argument, appellant never addresses the question of when, if ever, the "right not to speak" is available to corporations, particularly to heavily-regulated monopolies like PG&E. *Consolidated Edison* certainly does not establish any "right not to speak" for utility corporations. Although PG&E mentions that the origin of the doctrine it relies on is found in such cases as *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), it glosses over the fact that many of the considerations which led to the results in those cases do not apply to corporations, as contrasted with natural persons, and that there is even less justification for mechanically applying the doctrine to regulated utilities like PG&E.

In *Barnette,* the Court held that schoolchildren who were Jehovah's Witnesses could not be expelled for refusing to salute the flag and recite the Pledge of Allegiance, actions which were contrary to their religious beliefs. The Court emphasized that a question of individual rights was involved, and it enjoined the compulsory flag ceremony because it required "affirmation of a belief and an attitude of mind." *Id.* at 633. The Court summarized the basis for its decision with a strong endorsement of the need for government to accept and tolerate individual freedom of thought:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the

price of occasional eccentricity and abnormal attitudes. . . .

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

319 U.S. at 641-42. Plainly, those reasons have no application to corporations like PG&E.

Wooley v. Maynard, supra, is a direct descendant of *Barnette.* There, this Court was "faced with the question of whether the State may constitutionally require an *individual* to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. at 713 (emphasis added). The Court began its analysis by observing that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. It concluded that "the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

Since the heart of *Barnette* and *Wooley* lies in the "freedom of thought" enjoyed by "individuals," those cases do little or nothing to advance PG&E's cause. Although corporations may "speak," they certainly do not "think," nor is it apparent how they would go about exercising freedom of thought. A major foundation of our society is the recognition that there are certain matters of belief and conscience in which the government cannot properly interfere, yet because of their inanimate nature, corporations have no beliefs, feelings, or consciences of the kind protected by *Barnette* and *Wooley,* even though they may make statements and take positions through the human beings who work for them.

At first glance, *Miami Herald Publishing Co. v. Tornillo, supra,* seems more applicable to the present controversy, since there a corporation which owned a newspaper successfully challenged a

state law mandating a right of reply by certain persons who were the subject of critical articles. However, *Tornillo* in no way establishes a broad "freedom of thought" for corporations. Rather, it is a case vindicating the freedom of a newspaper to control its own editorial process, in which the Court struck down a "[g]overnmental restraint on publishing." 418 U.S. at 256. The Court held that the statute would inevitably have a chilling effect on news and commentary by pressuring editors to avoid controversy and that it was an "intrusion into the function of editors." *Id.* at 257, 258. Because *Tornillo* arose in the context of governmental regulation of newspapers, it cannot properly be read, as PG&E would have it, to establish any broad right of a non-media corporation not to speak. Rather, the decision reflects the principle that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned." *Id.* at 259 (White, J., concurring).

PG&E's citation of *Abood v. Detroit Board of Education, supra,* is also off the mark. Appellant finds in that case a First Amendment "right to refrain from speaking and from associating with the messages of others," PG&E Brief at 9, but it fails to recognize that *Abood* is a two-edged sword as applied to utility billing envelopes. It is undisputed that the ratepayers, not PG&E's shareholders, ultimately bear all postage costs up to one ounce. Therefore, if PG&E had a right under *Abood* to object to TURN mailings with which it disagreed, then PG&E ratepayers would unquestionably have a right to object to the PG&E newsletter *Progress* or other PG&E materials with which they disagreed. That would be true even though in each case the sponsor of the message (PG&E for *Progress* and TURN for its materials) would pay all of the additional costs resulting from the inserts. Moreover, *Abood,* no less than *Barnette* and *Wooley,* rests on the proposition "that an individual should be free to believe as he will." 431 U.S. at 235. Therefore, appellant's claim is without foundation, since no issue of individual freedom of thought is in-

volved in this case, where a corporation objects on First Amendment grounds to a regulatory program requiring it to enclose information which the PUC believes will be useful to ratepayers and to the regulatory process.

B. *The "Right Not To Speak" Is Much More Limited Than The Right To Speak.*

In addition to assuming that a corporation is entitled to the same protection for "freedom of thought" as an individual, PG&E analyzes this case as if the right to speak and the right not to speak are coextensive and require identical application in every case. PG&E in effect argues that in every situation in which it would be unconstitutional for the government to prohibit a speaker from addressing a particular topic, it would also be unconstitutional for the government to in any way require a reluctant speaker to say something he would prefer to leave unsaid or to be the conduit for the message of another, even if the statement is directly related to a lawful government regulatory program.

The flaw in PG&E's approach is apparent if one examines this Court's recent decision in *Zauderer v. Office of Disciplinary Counsel,* 105 S. Ct. 2265 (1985). The Court there struck down as unconstitutional certain prohibitions on advertising by a lawyer seeking contingent-fee cases, while at the same time upholding the constitutionality of the requirement that an attorney who advertises that no legal fees will be payable unless there is a recovery must also disclose that the client is liable for costs if the case is unsuccessful. The Court's resolution of *Zauderer* thus depended on the distinction between prohibitions, on the one hand, and required disclosure, on the other. *See, e.g., id.* at 2282 ("Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present"); *id.* ("appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal"). Similarly, the three Members of this

Court who reached the constitutional question in *Lowe v. Securities and Exchange Commission,* 53 U.S.L.W. 4705 (June 10, 1985), also expressed the view that the publisher, who could not constitutionally be prohibited from disseminating certain investment newsletters, could nonetheless be required to include facts (including even disclosure of a prior criminal conviction) which he would prefer not to publicize. *See id.* at 4717, 4719-20 (White, J., concurring in the result). Accordingly, appellant's argument is flawed because it fails to recognize this distinction, and hence it applies the wrong test in weighing the State's interest in this case against its own desire not to include consumer information about utility regulation in its billing envelopes. As we now show, when the correct test is applied, the program must be sustained.

C. *The State Reasonably Exercised Its Regulatory Power In This Instance.*

In *Zauderer,* this Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 105 S. Ct. at 2282. *See also id.* n.14. Likewise, in this case the decision made by the California PUC should be upheld so long as it is reasonably related to the State's regulation of utility rates and services, "areas that have been characteristically governed by the States." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 205 (1983).

In adopting the order challenged by PG&E, the PUC indicated that it expected the inclusion of TURN mailings four times a year for two years to improve the quality of the Commission's own fact-finding process. Not only would consumers receive additional information on utility issues, but TURN would have the opportunity to raise the funds necessary to enable it to participate more fully in Commission proceedings, which the PUC expected to enhance the record and thereby enable the Commission to do a

better job of setting rates and regulating utility services in accordance with its statutory mandate. Since the Commission's decision to grant TURN access to PG&E's billing envelopes for a two-year period followed extensive proceedings before the Commission, plus actual experience under the Commission's prior grant of similar authority to UCAN, this Court should give considerable deference to the PUC's determination as to the usefulness of permitting inclusion of the TURN flyers. Therefore, this decision should be sustained unless it directly and unnecessarily infringes on PG&E's First Amendment rights, which it does not.

In determining the reasonableness of the PUC decision challenged here, this Court should look to both the benefits which allowing TURN access to the PG&E billing envelopes is expected to bring to the Commission's regulatory program and the burden, if any, which allowing access may place on PG&E's exercise of its constitutional rights. Under all the cicumstances, the PUC's decision is clearly a proper one which is well within its authority.

A detailed discussion of the principal benefits of allowing access to TURN will be dealt with in the briefs of appellees. In that connection, there is one additional fact which, although not determinative, is surely significant—that a number of other States have independently reached the same conclusion as did the Commission concerning the benefits of promoting the representation of ratepayers through such a program. Thus, the Wisconsin statute, which *amici curiae* Wisconsin State Telephone Association, *et al.*, describe in their brief, became effective on November 29, 1979.[1] A similar Citizens Utility Board was organized pursuant to statute in Illinois, and it has been enclosing its materials in billing envelopes for a year. And, as noted above, UCAN made eight mailings in SDG&E billing envelopes over a two-year

[1] Only after this Court noted probable jurisdiction in this case did the Wisconsin State Telephone Association and Wisconsin Bell, Inc. file a lawsuit challenging the constitutionality of the statute.

period and is awaiting a decision on its request for an extension of its right of access.[2]

In addition to supporting the reasonableness of the Commission's determination that access by TURN will assist in the regulatory process, the existing programs are also important because they demonstrate that the problems which PG&E has conjured up are imaginary, not real. To be sure, there are a number of variations among these programs, including such matters as the structure of the group allowed access, the mechanics of access, and the computation of the payments to be made by the group. However, none of those has a direct bearing on this case, which presents a broad challenge to the authority of the States to permit any access as a means of improving their regulation of the service provided by utilities. But even limited examination of the actual experience in the states allowing access to billing envelopes proves that PG&E's dire predictions are without foundation.

For example, PG&E suggests that there is a likelihood that ratepayers may confuse TURN's messages with its own. PG&E Brief at 18. Not only does this contention ignore the provision in the PUC's order which requires TURN to clearly identify itself as the source of its mailings and to state that the contents have not been reviewed or endorsed by PG&E or the Commission, but it overlooks the fact that there is no evidence at all of ratepayer confusion resulting from any of UCAN's eight mailings. Moreover, even a cursory look at the Wisconsin Citizens Utility Board solicitations included in the Appendix to the Brief of Wisconsin State Telephone Association, *et al.*, makes it apparent that no ratepayer could believe that the materials emanated from a utility. WSTA Appendix at 7-a to 18-a, 22-a to 25-a. Moreover, PG&E is free to inform ratepayers that it is including

[2] Other states have adopted similar proposals which have not yet been implemented. On November 6, 1984, the voters of Oregon adopted an initiative measure which creates an independent, nonprofit public corporation which will be permitted to insert materials in utilities' billing envelopes. The New York Public Service Commission has tentatively approved access by New York CUB to the billing envelopes of certain utilities, but implementation of that order has been postponed pending the outcome of litigation in the New York courts. *See* page 2, *supra*.

an insert only because it is required to do so by law, and that it disagrees with the views expressed. *See, e.g.,* WSTA Appendix at 19-a to 20-a, 26-a to 28-a (examples of disclaimers and rebuttals by Wisconsin utilities).

PG&E also speculates that it may not be able to include *Progress* and other messages in the billing envelope in the four months each year that TURN is permitted to include its materials. PG&E Brief at 11-13. First of all, it should be noted that PG&E is completely free to include *Progress* and other messages every month, provided that it is willing to pay any additional postage charges. Moreover, experience demonstrates that it is unlikely that there will be any substantial excess postage, especially if the utility and TURN make reasonable efforts to coordinate their mailings to minimize costs. For example, UCAN has made eight mailings to SDG&E customers over the past two years, and no difficulties of the type feared by PG&E have arisen.[3] In any event, issues of cost allocation are everyday matters of regulatory law, and there is no foundation at all for PG&E's suggestion that its own communications with ratepayers will inevitably be unconstitutionally burdened because of the inclusion of TURN inserts in some months.[4]

Such technical details as how to avoid confusion by ratepayers or how to keep the TURN inserts from interfering with the dissemination of *Progress* could easily be dealt with if the actual operation of the program led to any of the problems envisioned

[3] The brief of SDG&E as *amicus curiae* in support of the jurisdictional statement in this case made no allegation that the UCAN mailings have in any way interfered with its own efforts to communicate with ratepayers or made those efforts more costly. SDG&E did not file a brief on the merits.

[4] *Amicus* American Gas Association argues that the PUC's order effects a "taking" of property without compensation. No such issue was raised in PG&E's jurisdictional statement in this Court, although it had been raised and rejected below. The California Supreme Court declined to review the PUC's ruling on the state-law issue of ownership of the extra space in the billing envelope, and the PUC's resolution of that issue is therefore binding upon this Court. *Estate of Thornton v. Caldor, Inc.,* 53 U.S.L.W. 4853, 4855 n.8 (June 26, 1985). Moreover, PG&E appears to concede that its shareholders could be required to pay the fair value of the "extra space" used by the utility for its messages. PG&E Brief at 39.

by PG&E. Perhaps realizing this, PG&E puts its main emphasis on its claimed right not to speak. But even assuming that PG&E does possess a constitutional right which is arguably affected by the order challenged here, the action taken by the PUC is plainly reasonable in light of the substantial state regulatory interests which support the program.

This Court's recent decision in *Zauderer* and the concurrence in *Lowe* establish that regulatory authorities have the power to require anyone engaged in a commercial activity, even an individual, to disclose information which may be useful to the public. The approach taken in *Zauderer* and in the *Lowe* concurrence had previously been endorsed in many other regulatory contexts. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637-38 (1980) (disclosures by charitable organizations to prevent fraud); *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 571 (1980) (advertising by a public utility); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72 n.24 (1976) (advertising by pharmacists); *Brooklyn Union Gas Co. v. Public Service Commission,* 101 A.D.2d 453, 458-60, 478 N.Y.S.2d 78, 82-83 (3d Dept. 1984) (upholding an order which required that any advertisement based on the price advantage of natural gas include a disclaimer stating that the advantage might be lost in the future as a result of deregulation).

The order challenged by PG&E is fully supported by these holdings, and in fact the inclusion of inserts is less intrusive by far than the compelled disclosures which this Court has approved in the past. For example, Mr. Zauderer was required to inform those reading his advertisements of their potential responsibility for costs. The other cases cited above also endorsed requirements of disclosure by the charity, utility, or business involved. PG&E, on the other hand, is merely being required to transmit, at no cost to itself, an insert in which another party is speaking, where the message presented will not be associated with PG&E and in fact will carry a statement that PG&E has not reviewed or endorsed it. In contrast, *Wooley,* the case on which PG&E principally relies, depended on the holding that a message displayed on an in-

dividual's automobile "is readily associated with its operator." 430 U.S. at 717 n.15. Here, PG&E, as a regulated utility, is free to distance itself from TURN's statements and to contradict them if it chooses to do so, just as the shopping center owners in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 88 (1980), were "free to publicly dissociate themselves from the views of the speakers or handbillers" who came onto their property. Therefore, given the minimal burden imposed, any constitutional right not to speak which PG&E may have is not violated by the PUC order under review.

* * *

Amici wish to make one final point which grows out of those made above. The position argued for by PG&E in this case threatens a substantial constitutionalization of utility regulation if it is accepted. While *Consolidated Edison* recognized that First Amendment rights may be violated if a regulatory decision directly prohibits discussion of particular issues, *Barnette,* on which PG&E relies heavily, points out that utility regulation and individual liberties call for entirely different types of constitutional analysis:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

319 U.S. at 639.

The fatal flaw in PG&E's approach is that it would require this Court to take a constitutional doctrine which recognizes the "freedom of thought" of individuals, and mechanically apply that doctrine to a utility which does not possess the personal sensitivities and individual conscience which the doctrine is designed to protect. Plainly, many regulatory decisions have some impact

on a utility's calculations about the desirability of engaging in various kinds of speech, including advertising. However, if PG&E is successful in obtaining the wholesale importation into the field of utility regulation of the constitutional doctrines developed to protect an individual's freedom of thought, the result will inevitably be a substantial erosion of the ability of the States to regulate utilities in the manner required to protect the public.

CONCLUSION

The judgment appealed from should be affirmed.

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July 1985